Supreme Court, U.S.
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ALEXANDER L. STEVAS
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NO. 84-1720

IN THE

Supreme Court of the United States

October Term, 1985

CLARENCE H. HOLDING,

Petitioner,

v.

SOVRAN BANK, EXECUTOR AND TRUSTEE UNDER THE WILL OF LILLIAN J. MUSE, DECEASED,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Virginia

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Question Presented for Review

Should this Court review the Supreme Court of Virginia's denial of Petitioner's petition for appeal where Petitioner failed to comply with the Virginia statute and Rule of Court requiring payment of a $25 filing fee at the time a petition for appeal is filed and where Petitioner makes no claim of good cause for his failure to pay such fee,

and

Where the decision of the Supreme Court of Virginia was based solely on adequate state grounds and no federal question was presented?

Parties to the Proceeding

Petitioner in this Court and defendant/ appellant below
.....Clarence H. Holding

Respondent in this Court and plaintiff/ appellee below
.....Sovran Bank, N.A., as Executor and Trustee under the Will of Lillian J. Muse, Deceased[1]

Other defendants in the lower court, not parties to Petitioner's petition for appeal in the Supreme Court of Virginia or to this action
.....Thomas R. Gale
Bertha J. Gale
The Trustees of Roanoke College
The Virginia Museum of Fine Arts

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[1]Sovran Bank, N.A., is a wholly-owned subsidiary of Sovran Financial Corporation. Other than wholly-owned subsidiaries of Sovran Financial Corporation, neither Sovran Financial Corporation nor Sovran Bank, N.A. has any subsidiaries or affiliates.

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Opinion Delivered in the Court Below

The January 18, 1984 Order of the Supreme Court of Virginia, of which Petitioner seeks review, is attached to Petitioner's brief as Exhibit 6, page 18. The Order of the Supreme Court of Virginia denying Petitioner's petition for appeal is attached as Exhibit 3, page 11, to Petitioner's brief.

The Circuit Court's opinion of July 23, 1984 is attached as Exhibit 7, pages 19 through 24, to Petitioner's brief.

Grounds on Which the Jurisdiction of this Court is Invoked

Respondent denies that this Court has jurisdiction because Petitioner's Petition for Writ of Certiorari contains no allegations sufficient to support jurisdiction under Rule 17 of the Rules of this Court, nor does the Petition make any allegation that calls into question the constitutionality of a state statute. See 28 U.S.C. 1257(3).

Statutes Involved

The Petitioner's Petition for Appeal was denied for violation of Rule 5:25 of the Rules of the Supreme Court of Virginia, which provides:

> The petition must be accompanied by a check or money order payable to the clerk of this Court for the amount required by statute.

The statute which sets out the fee is Virginia Code § 14.1-120 which provides in pertinent part:

> The Clerk of the Supreme Court shall charge the following fees:
>
> In every case in which a petition is presented twenty-five dollars, which shall be collected at the time such petition is presented.

No. 84-1720

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Clarence H. Holding,

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v.

Sovran Bank, Executor and Trustee Under the Will of Lillian J. Muse, Deceased,

Respondent.

Brief in Opposition to
Petition for Writ of Certiorari
To the Supreme Court of Virginia

Statement of the Case

Sovran Bank, N.A. ("Sovran"), is the executor and trustee under the will of Lillian J. Muse, who died on August 13, 1983. At the time this action

began, Sovran was known as First & Merchants National Bank.

Sovran filed this action on behalf of the estate of Lillian Muse on December 16, 1984, in the Circuit Court for the City of Richmond, seeking a declaratory judgment concerning claims made by Petitioner, Clarence H. Holding ("Mr. Holding") to a corporation owned by Mrs. Muse known as Mutual Finance Corporation.

At trial on July 11, 1983, Mr. Holding chose not to testify in support of his claims. After a bench ruling for Sovran, on July 23, 1984 the Circuit Court issued a written opinion[2] that Holding had no evidence in support of

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[2]Exhibit 7 to the Petition for Writ of Certiorari.

his claims to Mutual Finance Corporation and decreed that the corporation was part of Mrs. Muse's estate.

On October 22, 1984, Mr. Holding filed a petition for appeal with the Supreme Court of Virginia. On December 6, 1984, the Supreme Court of Virginia dismissed the petition for appeal for failure to comply with Rule 5:25 of the Rules of the Supreme Court of Virginia, which requires that a $25 filing fee be paid at the time a petition for appeal is filed.

Holding sought a rehearing on his petition.[3] On January 18, 1985, the

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[3]Virginia Code § 675.1 permits a party whose petition is dismissed for failure to pay the writ tax to file a motion, after notice to opposing counsel, for the dismissal to be set

(Footnote Continued)

Supreme Court of Virginia denied his request.

Reasons for Denying the Petition

This is an ordinary case of a litigant failing to comply with a court's procedure. There are no issues in this action that meet the requirements of Rule 17 or of 28 U.S.C. § 1257(3). There are no special or important reasons for this Court to exercise its discretion and grant Mr. Holding's Petition.

(Footnote Continued)
aside "for good cause shown." Mr. Holding filed no such motion but instead requested a rehearing, as allowed by Virginia Code § 675.2.

A. The Supreme Court of Virginia Correctly Found that Mr. Holding had not Complied with its Rules in Filing his Petition for Appeal.

As shown by the exhibits to Mr. Holding's Petition for Writ of Certiorari, Mr. Holding filed his petition for appeal in the Virginia Supreme Court on the last day of the three month period allowed for filing an appeal. See Rule 5:24 of the Rules of the Supreme Court of Virginia. He did not include payment of his filing fee as required by Rule 5:25 which states: "The petition must be accompanied by a check or money order payable to the clerk of this Court for the amount required by statute." The statute, Virginia Code § 14.1-120, requires payment of $25 to initiate a petition for appeal.

The Virginia Supreme Court dismissed Mr. Holding's petition for appeal for failure to comply with these rules. In his request for rehearing, Mr. Holding made no claim that he was unable to pay the $25 fee. In fact, he then enclosed the $25 fee. His only explanation for his failure to comply with the rules was that he "forgot". See Exhibit 5 to the Petition, page 13.

In Green v. Elbert, 137 U.S. 615, 621 (1891), this Court stated:

> To the proper conduct of business of this court, rules are necessary, and, having been prescribed, reasonable compliance with them is expected and must be insisted upon. When they are disregarded, dispensation from the circumstances can be only extended when the circumstances furnish adequate excuse, were this otherwise, our regulations might become more honored in the breach than the observance, and the recognition of due procedure

would be seriously weakened and impaired.

Just as this Court has rules that must be followed, so does the Supreme Court of Virginia. That court properly dismissed Mr. Holding's petition for appeal for failure to comply with those rules.

B. Virginia's $25 Filing Fee And Its Applicability To This Action Are Not Unconstitutional.

Mr. Holding's Petition to this Court failed to explain how he believes his constitutional rights have been denied other than claiming that the Supreme Court of Virginia violated the 13th and 14th Amendments to the Constitution by rejecting his appeal. He gave no argument or case authority in support

of his position. See Petition for Writ of Certiorari, pages 5 and 6.[4]

However, it is clear that neither Rule 5:25 nor Virginia Code § 14.1-120 is unconstitutional. The right to have a decision reviewed is not an absolute right in Virginia, but is subject to such conditions as the legislature may put upon it. Town of Falls Church v.

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[4]Since Mr. Holding has presented no special circumstances making application of Rule 5:25 to his case unconstitutional, it must be assumed that he is claiming that the Rule itself is unconstitutional. If so, Mr. Holding has again ignored a rule of court. Rule 28.4(c) of the Supreme Court Rules requires that in any proceeding wherein the constitutionality of a state statute is drawn in question, but where the state is not a party, the petition shall recite that 28 U.S.C. § 2403(b) may be applicable and shall be served upon the Attorney General of the state. There is no indication in Mr. Holding's Petition that any such service was made.

County Bd., 166 Va. 192, 184 S.E.2d 459 (1936). Moreover, under both federal and state law:

> The right of appeal is no part of due process of law. All that a litigant can ask is that in some appropriate way, before some duly constituted tribunal, its compensation shall be determined. Backus v. Port Street Union Depot Co., 169 U.S. 557 (1898). . . .

Rudacille v. State Commission, 155 Va. 808, 817, 156 S.E. 829 (1931). Mr. Holding had the opportunity to present his claims in the Circuit Court. As Mr. Holding had no right to an appeal except in the discretion of the Supreme Court of Virginia, he can claim no constitutional deprivation in that court's decision to deny his petition.[5]

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[5]Even if Mr. Holding did have a
(Footnote Continued)

Moreover, this rule is no different from any other rule of court or statute designed to establish a procedure for filing claims or appeals. It is no different than the requirement that this brief in opposition to Mr. Holding's Petition be filed within thirty days of service of his Petition.[6]

(Footnote Continued)
"right" to appeal the Circuit Court's decision, a restraint on access to that appeal would be invalidated only if it were so arbitrary, unequal, and oppressive as to shock the fairness the 14th Amendment was intended to satisfy. See Chicago & N. R. Co. v. Nye Schneider Fowler Co., 260 U.S. 35 (1922). Clearly, a $25 filing fee does not meet this heavy burden.

[6]Nor is it any different than any other statute of limitations, the constitutionality of which are routinely upheld. See, e.g., G. D. Searle U. Co. v. Cohn, 455 U.S. 404, 408 (1982) (upholding constitutionality of New Jersey's statute of limitations); Jewson v. Mayo Clinic, 691 F.2d 405, 411 (8th

(Footnote Continued)

Conclusion

There is no reason for this Court to review the Supreme Court of Virginia's refusal to grant Mr. Holding's petition for appeal. The decision of the Virginia Supreme Court is founded solely on adequate state grounds, and the decision does not deny Mr. Holding any constitutional rights. Therefore, the Petition for Writ of Certiorari to review the decision of the Virginia Supreme Court should be denied.

(Footnote Continued)
Cir. 1982) (upholding the Minnesota statute of limitations).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and exact copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Virginia were mailed, postage prepaid, this 31st day of May, 1985, to Clarence H. Holding, 1901 Woodbine Road, Richmond, Virginia 23225.